FEB 21 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 571

HERBERT STITH, ET AL.,

Appellants,

vs.

ED PINKERT, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

LEFFEL GENTRY,
U. A. GENTRY,
Counsel for Appellees.

INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
Statement of issues on appeal	1
No substantial federal question is presented by the attempted appeal	4
Argument and cases supporting motion to dismiss or affirm	7

Table of Cases Cited

Ballard v. *Hunter*, 204 U. S. 241, 27 S. Ct. 261, 51 L. ed. 461	8
Central Hanover Bank & Trust Co. v. *Kelly*, 319 U. S. 94, 63 S. Ct. 945, 87 L. ed. 1282	7
Griffin v. *Griffin*, 327 U. S. 220, 90 L. ed. 635	4, 6
Hagar v. *Reclamation District*, 111 U. S. 701, 4 S. Ct. 663, 28 L. ed. 569	8
Horne v. *Ocala*, 143 Fla. 108, 196 So. 441, 311 U. S. 608, 61 S. Ct. 28, 85 L. ed. 385	8
Leigh v. *Green*, 193 U. S. 79, 24 S. Ct. 390, 48 L. ed. 623	8
Longyear v. *Toolan*, 209 U. S. 414, 28 S. Ct. 506, 52 L. ed. 859	8
Marx v. *Hanthorn*, 148 U. S. 172, 37 L. ed. 410	4, 5
Mullane v. *Central B. & T. Co.*, 339 U. S. 316, 94 L. ed. 578	6, 7
Ontario Land Co. v. *Yordy*, 212 U. S. 152, 29 S. Ct. 278, 53 L. ed. 449	8
Reina v. *Hope*, 158 Fla. 774	8
Seminole Fruit & Land Co. v. *Scott*, 291 Fed. 179	8
Spitcaufsky v. *Hatten*, 353 Mo. 94, 182 S. W. (2d) 86, 160 A.L.R. 990	8
Virginia and West Virginia Coal Co. v. *Charles*, 251 Fed. 83	4, 6

Page

Winona & St. Peter Land Co. v. *State of Minnesota*, 159 U. S. 526, 16 S. Ct. 83, 40 L. ed. 247 8
Wood v. *Brady*, 150 U. S. 18, 14 S. Ct. 6, 37 L. ed. 981 7

STATUTES CITED

Acts of March 22, 1881, p. 161, Sec. 10 (Crawford & Moses Digest, 1921, Secs. 5678, 5679 2

Acts of 1937:

Act 101 2
Act 207 ..... 2, 3, 4

American Jurisprudence, Vol. 48, pp. 738, 739, Sec. 215 8

Constitution of the United States:

Fifth Amendment 1, 4
Fourteenth Amendment 1, 4

ARKANSAS SUPREME COURT

No. 9297

HERBERT STITH, ET AL.,

Appellants,

vs.

ED PINKERT, ET AL.,

Appellees

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION, AND MOTION TO DISMISS OR AFFIRM.

Appellees in the above entitled cause, for their joint statement, and in support of appellees' motion to dismiss or affirm, respectfully show the following:

I. Statement of Issues on Appeal

The question sought to be presented on this appeal is appellants' claim that the decree, and sale thereunder, of lands by a municipal improvement district, under Arkansas law providing for the foreclosure of delinquent assessments in a proceeding *in rem,* or in the nature of a proceeding *in rem,* without personal service on the owner of the property, is in violation of the due process clause of the 5th and 14th amendments to the Constitution of the United States. Appellees deny appellants' claim, and the Supreme Court of Arkansas, in the opinion and judgment here challenged, determined the question raised by appellants adversely to them.

Prior to the passage of Act 207 of the Acts of the General Assembly of Arkansas for 1937, the statute governing the foreclosure of delinquent assessments in improvement districts required personal service on the property owner, if known and a resident of the county (Acts of March 22, 1881, p. 161, Sec. 10), Crawford & Moses Digest (1921), Secs. 5678, 5679, and this statute was in force at the time of the institution of the foreclosure suit which later resulted in a decree of foreclosure and the sale of the property involved herein. Said Section 5678 of Crawford & Moses Digest, providing for personal service, was amended by Act 101 of the General Assembly of 1937, approved February 17, 1937, in which publication of a notice of the pendency of the suit was substituted for personal service, and in the same act, Sec. 5679 of Crawford & Moses Digest, the section providing for constructive service where the defendant could not be found in the county or the ownership was unknown, was specifically repealed (Act 101, Acts 1937, p. 381). Later, in the same session (1937) the legislature passed Act 207, a copy of which is appended to the plaintiffs-appellants' statement of jurisdiction, designated "Appendix D."

Said Act No. 207 was much broader than the previous amendatory act and covered the entire procedure for the foreclosure of delinquent assessments, including *inter alia* the nature of the pleadings to be filed, the character of notice to be given of the pendency of the suit and the manner of publication, the suggested form of notice, the character of the notice of sale to be published, the length of time that said notice of sale should be published, and the terms upon which the property should be sold. The Act provided that in the publication of the notice of the pendency of the suit the property should be listed in the name of the supposed owners, but that, "said proceeding and judgment shall be

in the nature of proceedings *in rem*, and it shall be immaterial that the ownership of the said lands, lots, blocks, or parcels of land, railroad tracks and rights-of-way be incorrectly alleged in said proceeding, and such judgment shall be enforced wholly against such property and not against any other property or estate of said defendant."

The original foreclosure suit was filed by the improvement district on June 7, 1927, and by amendment to the original complaint, filed July 18, 1935, and the property involved herein was brought into the suit for delinquent assessments due in 1934. No further action was taken in the matter until after the passage of Act No. 207 of 1937, *supra*. Subsequent to the passage of said act there was a warning order published for the time and in the manner in said act provided, following which a decree was rendered on November 23, 1937. The property was sold on March 16, 1938, and was confirmed on April 12, 1938. In the complaint, the decree, and in the notice of the pendency of the suit, the supposed owner was given as James H. *Smith*. The real owner was James H. *Stith*.

Complaint is also made by plaintiffs-appellants that in the published notice of the sale of the property the supposed owner's name was not listed and it is also contended that the description in such notice was indefinite. There is no contention made, however, that the description was indefinite in the complaint or in the decree of foreclosure under which the property was sold.

Plaintiffs-appellants take the position that:

(a) Act No. 207 of 1937 of the Acts of the General Assembly of Arkansas, providing for a proceeding *in rem*, or in the nature of a proceeding *in rem*, for the foreclosure of assessment liens in municipal improvement districts, without personal notice to the owner of the property, is in

violation of the due process clause of the 5th and 14th amendments to the Constitution of the United States.

(b) That even if said Act No. 207 is valid, that the application of the act providing for substituted service to the present suit which was pending at the time of the passage of the act, would be in violation of the due process clause of the 5th and 14th amendments to the Constitution of the United States.

(c) That the opinion and holding of the Supreme Court of the State of Arkansas that the sale of the property under a complaint and a decree naming James H. *Smith* as the owner of the property rather than James H. *Stith*, the true owner, is in violation of the due process clause of the 5th and 14th amendments to the Constitution of the United States.

(d) That the holding of the Supreme Court that the confirmation of the sale cured any defects in the publication of the notice of sale, was in violation of the due process clause of the 5th and 14th amendments to the Constitution of the United States.

(e) That the finding of the Supreme Court that there was no evidence of an effort to redeem the property constituted the taking of plaintiffs-appellants' property in violation of the due process clause of the 5th and 14th amendments to the Constitution of the United States.

II. No Substantial Federal Question Is Presented by the Attempted Appeal

The appellants rely on the following cases to sustain the jurisdiction of this appeal:

Marx v. *Hanthorn*, 148 U. S. 172, 37 L. Ed. 410;
Griffin v. *Griffin*, 327 U. S. 220, 90 L. Ed. 635;
Virginia and West Virginia Coal Company v. *Charles*, 251 Fed. 83.

In the case of *Marx* v. *Hanthorn*, 148 U. S. 172, 37 L. Ed. 410, the question of due process under the Federal constitution was not involved. The decision is a review of a judgment in favor of the defendant, rendered by the Circuit Court of the United States, adjudging him to be the owner of the premises and entitled to the possession thereof, in an action brought by Emil Marx against Ida J. Hanthorn to recover possession of land in Portland, Oregon. The land in question admittedly belonged to Ida J. Hanthorn, but on the delinquent tax roll the property was listed as belonging to Ida J. *Hawthorn* and the property was advertised and sold as the property of Ida J. *Hawthorn*. The lower court held that, although not specifically stated, the fair meaning of the Oregon statutes required, in sales for taxes, that the name of the owner of the land to be sold should appear in the notice of sale; and the court was further of the opinion that to give notice that the property of Ida J. *Hawthorn* was to be sold was not notice that the property of Ida J. Hanthorn was to be sold. The sale involved, however, was a statutory proceeding, whereas the instant case involved the foreclosure of a lien in a court of competent jurisdiction, the matter of service being provided by the statute in which the property itself is made the defendant, and while the statute provides that in the publication of the notice of the pendency of the suit the name of the "supposed" owner shall be given, the statute specifically provides that it shall be immaterial if the true ownership be incorrectly stated and that the judgment shall be given against the lands only and not against the owner of the property. The difference between a statutory sale and a judicial sale is elementary. In the first, every step provided by the statute must be substantially followed. In the second, where the court acquired jurisdiction, any error or irregularity thereafter is cured by the confirmation of the sale.

In the case of *Griffin* v. *Griffin*, 327 U. S. 220, 90 L. Ed. 635, a judgment was entered for accrued instalments of alimony without notice to the husband. Mr. Justice Stone, in delivering the opinion of the court, uses this language:

> "Concededly, the 1938 judgment was entered without actual notice to or appearance by petitioner, and without any form of service of process calculated to give him notice of the proceeding."

Continuing, the Court later in the opinion says:

> "It is plain in any case that a judgment *in personam* directing execution to issue against petitioner and thus purporting to cut off all available defenses, could not be entered upon any theory of the state's power over him, without some form of notice by personal or *substituted service* (citing cases). Such notice cannot be dispensed with, even in the case of judgments *in rem*, with respect to property within the jurisdiction of the court rendering the judgment." (Emphasis ours)

Appellees concede that "without some form of notice by personal or *substituted service*" a judgment would be void and the taking of the property thereunder would be in violation of the due process clause of the Constitution of the United States. No such facts are, however, presented by the present record. The statute under consideration provides for the notice of the pendency of the suit in a manner reasonably calculated to advise all interested parties. *Mullane* v. *Central B. & T. Co.*, 339 U. S. 316, 94 L. Ed. 578, 584.

The case of *Virginia and West Virginia Coal Company* v. *Charles*, 251 Fed. 83, was a suit to establish the existence and contents of a lost document evidencing the title of one in possession of lands. It was held that the suit was not strictly *in rem* and the judgment therefore was binding only on the parties thereto. In the present case the Su-

preme Court of the State has held that the proceedings here involved were *in rem*. This being true, the case has no bearing on the question here involved.

Argument and Cases Supporting Motion to Dismiss or Affirm

Ordinarily, matters of local or state law are for the state courts and their decisions in respect thereto are binding on the Supreme Court. *Central Hanover Bank & Trust Co.* v. *Kelly*, 319 U. S. 94, 63 S. Ct. 945, 87 L. Ed. 1282. The question whether the action to foreclose the lien for delinquent assessments under the statutes of Arkansas is a proceeding *in rem* or *in personam* is one upon which the decisions of the Supreme Court of this state are binding on the Supreme Court of the United States. *Wood* v. *Brady*, 150 U. S. 18, 14 S. Ct. 6, 37 L. Ed. 981, and there is no Federal question involved in the finding of the trial court, which was affirmed by the Supreme Court of Arkansas, to the effect that there was no evidence in the record that the owner of the property had made any effort to redeem within the period allowed for redemption after the sale of the property under the decree. The question then narrows to whether or not the statute providing for a proceeding against the property by publication of a notice to all interested persons, for the time and in the manner therein provided, is such notice as is reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 316, 94 L. Ed. 578, 584.

Statutes commonly provide for the enforcement of a lien of a special or local assessment by some mode leading to the sale of such property. A suit or proceeding to enforce such a lien generally is in the nature of a proceeding *in rem*,

although against the owner of the land, at least where no personal liability attaches. 48 Am. Jur., pp. 738, 739, Sec. 215. Proceedings *in rem* for the foreclosure of tax liens, similar in all respects to the statute under consideration, the jurisdiction the court exercises under such statute, and the process by which that jurisdiction is acquired, have been upheld so often by the Supreme Court of the United States that it is sufficient to cite the decisions in which they have been sustained.

Leigh v. *Green*, 193 U. S. 79, 24 S. Ct. 390, 48 L. Ed. 623; *Winona & St. Peter Land Co.* v. *State of Minnesota*, 159 U. S. 526, 16 S. Ct. 83, 40 L. Ed. 247; *Hagar* v. *Reclamation District*, 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. 569; *Longyear* v. *Toolan*, 209 U. S. 414, 28 S. Ct. 506, 52 L. Ed. 859; *Ballard* v. *Hunter*, 204 U. S. 241, 27 S. Ct. 261, 51 L. Ed. 461; *Ontario Land Co.* v. *Yordy*, 212 U. S. 152, 29 S. Ct. 278, 53 L. Ed. 449. To the same effect see *Seminole Fruit & Land Co.* v. *Scott*, 291 Fed. 179.

Cases from practically every State in the Union might be cited in which similar statutes have been upheld against the claim of a violation of due process. The case of *Spitcaufsky, et al.* v. *Hatten, Collector*, 353 Mo. 94, 182 S. W. 2d 86, 160 A. L. R. 990, is the subject of an annotation (160 A. L. R. 1026) where a great number of cases are correlated on the subject. See also *Reina, et al.* v. *Hope*, 158 Fla. 774, 30 So. 2d 173.

Of peculiar interest is the case of *Horne* v. *Ocala*, 143 Fla. 108, 196 So. 441, in which the precise question here was raised in an appeal to the Supreme Court of the United States and dismissed for want of a substantial Federal question. 311 U. S. 608, 61 S. Ct. 28, 85 L. Ed. 385.

The case of *Ballard* v. *Hunter*, 204 U. S. 241, 51 L. Ed. 461, is decisive of every Federal question raised in the present appeal. In that case a writ of error was prosecuted to review a judgment of the Supreme Court of Arkansas

sustaining the validity of a sale of land of plaintiff in error for levee taxes. The procedure provided for the sale of the lands for delinquent assessments where owned by non-residents, or where the ownership was unknown, was essentially the same as that procedure provided in the act presently under consideration. Notice of the pendency of the suit to be given non-residents and unknown owners, respectively, was by publication weekly for four weeks prior to the date of the term of court in which final judgment was to be entered, in some newspaper published in the county where the suit was pending. That same notice is provided for in the act under consideration, except that it applies to all landowners, residents as well as non-residents. In the reported case the form of notice which might be given was set out in the act which, like the statute here in question, listed the name of the supposed owner of the lands proceeded against. The exact language of the form of notice is set out in the margin of the opinion, 204 U. S. pp. 243, 244. The statute, also, as in the case at bar, provided that the proceedings should be in the nature of proceedings *in rem* and that it should be immaterial if the ownership of the land should be incorrectly alleged; that the judgment should be enforced only against the land and not against any other party. It was contended in the reported case "that the acts of 1893 and 1895 required a notice to be given to the owners of the lands proceeded against in the suit they provided for, and no such notice was given, and the sales were therefore unauthorized and void." (204 U. S. p. 249). This was based on the fact that the complaint showed that A. B. Ballard was the owner of the lands when in fact Josephine Ballard was the true owner, and that Josephine Ballard was not made a defendant in the suit although the records of the county disclosed that she was the owner thereof.

This same contention is made by the plaintiffs-appellants

in the instant case. They contend that the assessment records, prepared by the commissioners and filed with the city collector, and constructively in their possession, showed the true owner of the land to be James H. Stith, and, notwithstanding this fact, the complaint, the decree and the notice of the pendency of the suit named James H. Smith as the owner which, as they contend, did not constitute notice to the true owner. In answer to this contention in the *Ballard* case, *supra*, the Supreme Court said (204 U. S. pp. 261, 262):

> "But the statute provided against such an omission. It provided that the proceedings and judgment should be in the nature of proceedings *in rem*, and that it should be immaterial that the ownership of the lands might be incorrectly alleged in the proceedings. We see no want of due process in that requirement or what was done under it. It is manifest that any criticism of either is answered by the cases we have cited. The proceedings were appropriate to the nature of the case."

The language in the statute quoted in the *Ballard* case is exact with the language in the statute under consideration in the case at bar; and, if the naming of one other than the owner of the lands in the complaint and in the notice of the pendency of the suit constituted due process in the reported case, it is obvious that it would also constitute due process in the case at bar.

The other assignments of error do not raise any Federal question. The question of whether or not the statute required the notice of sale to list the name of the owner of the property, the question of whether or not the property was sufficiently described in the notice of sale, and the holding of the State Courts that there was no evidence in the record to show an effort to redeem the property from the sale under the decree, were matters exclusively within the jurisdiction of the Supreme Court of the state. This point, for a

different reason, was also passed upon in the *Ballard* case. There it was urged that the lands owned by plaintiffs in error were sold to pay the levee taxes on lands they did not own by reason of inaccurate description, and their lands were thereby taken without due process of law. The court said (p. 204):

> "What lands were properly assessed to Ballard and what lands he owned were facts to be alleged in the original suit and established by the proof there introduced or by admission through the default of the owners of the land. If there was error, it cannot be a ground for setting aside the decree if the court had acquired jurisdiction to render the decree. Error or irregularities in the suit does not take from it or its decree the attribute of due process."

So, in the present case, if it should be conceded that the description of the lands in the notice of sale was erroneous (the Supreme Court of the State held that the description was not indefinite) such error or irregularity not being jurisdictional, would not take from the decree and the sale of the property the "attribute of due process."

It is respectfully submitted that the questions presented in this appeal have long ago been so definitely determined that no substantial question is presented by this appeal entitling the appellants to invoke the jurisdiction of the United States Supreme Court.

WHEREFORE, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the Supreme Court of the State of Arkansas be affirmed.

LEFFEL GENTRY,
U. A. GENTRY,
Pyramid Building,
Little Rock, Arkansas,
Counsel for Appellees.